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LAU KOK LOON v. LOW YEE MENG

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[SUIT NO: WA-22NCC-530-10-2020]
18 JUNE 2021

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CIVIL PROCEDURE: *Striking out – Application for – Application to strike out plaintiff's suit for return of shares from defendant – Whether shares transferred under illegal contract – Whether defendant holding shares under resulting trust – Whether transfer of shares was to deceive plaintiff's creditors and Director General of Insolvency – Whether plaintiff could rely on locus poenitentiae to claim shares – Whether plaintiff's conduct in transferring shares and not disclosing same to avoid and deceive creditors contravened s. 109(1) of Bankruptcy Act 1967 and s. 422 of Penal Code – Whether plain and obvious case for court to strike out plaintiff's action – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

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CONTRACT: *Illegality – Deception – Whether shares transferred under illegal contract – Whether transfer of shares was to deceive plaintiff's creditors and Director General of Insolvency – Whether plaintiff could rely on locus poenitentiae to claim shares – Whether plaintiff's conduct in transferring shares and not disclosing same to avoid and deceive creditors contravened s. 109(1) of Bankruptcy Act 1967 and s. 422 of Penal Code*

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TRUSTS: *Resulting trust – Shares – Transfer of – Execution of trust deed for plaintiff to hold shares in trust for defendant – Whether transfer of shares from plaintiff to defendant was transfer by plaintiff as trustee of share to defendant as beneficiary to trust deed – Whether there was resulting trust*

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The plaintiff was the defendant's uncle. The defendant's late father, Low Kok Tuan ('LKT') was the plaintiff's brother. LKT passed away on 17 April 2016. On 20 July 1983, at the plaintiff's request, LKT entered into a sale and purchase agreement for the purchase of a piece of land ('the Semenyih land'). On 20 September 1983, the plaintiff founded Semenyih Jaya Sdn Bhd ('Semenyih Jaya'). The original shareholders and directors of Semenyih Jaya were the plaintiff and LKT. On 30 November 1984, the plaintiff caused Semenyih Jaya to be registered as the owner of the Semenyih land. In 1989, the plaintiff and LKT were sued in their capacity as guarantors for a term loan granted by Arab-Malaysian Merchant Bank Berhad ('AMMB') to Sin Chuan Aik Sdn Bhd and as partners of Kiat Hoe Huat & Co for a loan facility granted by AMMB to them ('the AMMB legal proceedings'). To avoid the consequences arising from the AMMB legal proceedings, a trust deed was executed by the plaintiff on 16 May 1990 to declare that he held his one share in Semenyih Jaya in trust for the defendant on account of natural love and affection ('the trust deed'). It was the plaintiff's case that he did not intend

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to give his one share in Semenyih Jaya to the defendant and that he would remain the beneficial owner of the one share notwithstanding the trust deed. Put it simply, the trust deed was a sham which was intended to deceive the plaintiff's creditors, particularly, AMMB. In 1994, AMMB commenced bankruptcy proceedings against the plaintiff and LKT based on judgments that AMMB had obtained against them in the AMMB legal proceedings. To avoid the consequences of bankruptcy, on 15 July 1995, the plaintiff transferred his one share in Semenyih Jaya to the defendant. Similarly, on 12 April 1996, LKT also transferred his one share in Semenyih Jaya to the plaintiff's son, Lau Tein Khang ('LTK'). Again, it was the plaintiff's case that he did not intend to give his one share in Semenyih Jaya to the defendant by the transfer and that the plaintiff remained the beneficial owner of the one share at all times. In support, the plaintiff stated that the defendant did not pay the plaintiff for the one share that was transferred to him and further that the defendant had agreed to re-transfer the plaintiff's one share and any other shares accrued from the said one share to the plaintiff when so requested. In this regard, the defendant had executed a blank Form of Transfer of Securities in Form 32A of the Companies Act 1965 ('blank Transfer Form') simultaneously with the plaintiff's transfer of his one share to the defendant. On 25 July 1995, the defendant was appointed a director of Semenyih Jaya and the plaintiff resigned as a director of Semenyih Jaya on 26 July 1995. The plaintiff was adjudicated a bankrupt on 2 August 1995. On 25 April 1996, upon the instruction of the plaintiff, LKT and the defendant appointed LTK as a director of Semenyih Jaya and on the same day, LKT resigned as a director of the company. LKT was adjudicated a bankrupt on 8 May 1996.

Subsequently, on 25 May 1996, both the defendant and LTK were allotted with an additional 10,000 and 11,000 shares in Semenyih Jaya respectively. Further, on 8 November 1996, the authorised share capital of Semenyih Jaya was increased from 250,000 shares to 500,000 shares. Following from the increase in the authorised capital, 250,903 shares were allotted to LTK and 228,095 shares were allotted to the defendant respectively as bonus shares. It was the plaintiff's case that the 10,000 allotted shares and the 228,095 bonus shares allotted to the defendant were held by the defendant in trust for the plaintiff, based on the fact that these shares had arisen or accrued under the original one share that the plaintiff had transferred to the defendant. The plaintiff contended that he did not intend to give the 238,095 shares in Semenyih Jaya to the defendant at any time and no consideration was provided by the defendant in respect of these shares. On 23 November 2000, at the request of, *inter alia*, the plaintiff, a Compromise and Settlement Agreement was reached between AMMB on the one part and the defendant together with one Low Toon Tyne on the other part in respect of the outstanding due and owing under the judgments obtained from the AMMB legal proceedings. More specifically, AMMB had agreed to accept the sum

of RM6,000,000 in full and final settlement of the total outstanding sum of RM14,858,170.40. In return, AMMB had agreed to support the plaintiff and LKT's application to annul the bankruptcy order made against him ('the Compromise and Settlement Agreement'). In 2002, the bankruptcy orders against the plaintiff and LKT were annulled. On 22 May 2012, the plaintiff and LKT were appointed back as directors of Semenyih Jaya. On the same day, the authorised share capital of Semenyih Jaya was increased to 600,000 shares from 500,000 shares. The plaintiff and LKT were allotted one share each in Semenyih Jaya. On 28 November 2013, a meeting was held between the plaintiff, LKT, Low Toon Thye and Low Twan Kin. The plaintiff contended that at this meeting, it was agreed that in consideration of a total sum of RM1,200,000, LKT and the defendant shall not make any claim and shall not have any interest in Semenyih Jaya and or its assets ('the settlement'). However, the RM1,200,000 was not paid. On 4 November 2014, the defendant demanded that the plaintiff and LTK render an account for certain payments that were made between July and September 2013 from the bank account of Semenyih Jaya. This prompted the plaintiff to respond by asserting that the shares registered in the name of LKT and the defendant were held in trust for the plaintiff which the defendant denied. This led to the filing of the present action where the plaintiff sought, *inter alia*, the return of the shares. The defendant, however, filed an application to strike out the action under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of the court to strike out the plaintiff's action. The main ground for the striking out application was premised on illegality, namely, that the transfer of the plaintiff's one share and the subsequent allotment of the shares in Semenyih Jaya in the defendant's name were to deceive the plaintiff's creditors and the Director General of Insolvency by putting the shares beyond their reach. It was the defendant's stand that under s. 24 of the Contracts Act 1950, the agreement entered between the plaintiff and the defendant was unlawful as it had the object of circumventing the provisions of the Bankruptcy Act 1967 (now Insolvency Act 1967) and the Penal Code, and was also against public policy. In resisting the striking out application, the plaintiff claimed that the defendant was holding the shares under a resulting trust.

Held (striking out plaintiff's action):

(1) The trust deed suggested that the plaintiff was merely holding the one share in trust for the defendant at all times. Therefore, the transfer of the one share in 1995 from the plaintiff to the defendant, unless there was other evidence showing otherwise, was nothing more than a transfer by the plaintiff as trustee of the share to the defendant as the beneficiary to the trust deed. Accordingly, the circumstances of the present case did not at all support a resulting trust. (paras 48 & 49)

(2) The plaintiff had transferred his one share in Semenyih Jaya and permitted further shares to be registered in the defendant's name for the unlawful purpose of avoiding the same from being discovered by AMMB and/or to put the share beyond the reach of AMMB in the enforcement of the judgments obtained against the plaintiff under the AMMB legal proceedings. Indeed, after judgments were obtained against the plaintiff, AMMB was not able to recover the fruits of its litigation and the plaintiff was adjudged a bankrupt. There was no evidence that the plaintiff had declared to the Director General of Insolvency his shares in Semenyih Jaya if indeed the plaintiff had repented from his illegal action. On the contrary, the plaintiff had proceeded to negotiate for a compromise and settlement with AMMB on the basis that a sum of RM 6,000,000 be paid in full and final settlement of the total outstanding sum of RM14,858,170.40 under the Compromise and Settlement Agreement. There was nothing adduced before this court that the plaintiff had disclosed his ownership of his shares in Semenyih Jaya to AMMB when AMMB agreed to accept such a significant discount from the outstanding sum in settlement. The plaintiff had carried out the illegal purpose. To permit the plaintiff to recover his shares would mean that the court would lend its hand to the plaintiff to achieve that very purpose. (paras 58-61)

(3) The plaintiff's annulment of his bankruptcy order in this case did not take away the offences that the plaintiff had committed under the provisions of the Bankruptcy Act. The plaintiff was not able to rely on *locus poenitentiae* to make his claims for the shares from the defendant. Not only was there no evidence that the plaintiff had repented from his unlawful act, the contrary was in fact the case – the plaintiff had successfully deceived AMMB to accept a much lesser sum as full and final settlement of the judgment debts and to support the annulment of his bankruptcy order. The plaintiff was only seeking to withdraw from the arrangement with the defendant after the defendant had sought to assert ownership of the shares in defiance of the understanding reached with the plaintiff. (paras 64 & 65)

(4) The plaintiff's action in transferring his shares to the defendant and not disclosing the same to avoid his creditors and to deceive the Director General of Insolvency was a contravention of s. 109(1) of the Bankruptcy Act (now Insolvency Act). The plaintiff's action was also a contravention of s. 422 of the Penal Code. The purpose of the aforesaid provisions in the Bankruptcy Act and the Penal Code would be enhanced if the plaintiff's claim against the defendant was denied. The illegality in the arrangement between the plaintiff and the defendant was the very act that was prohibited by the statutory provisions. To permit the claim would only encourage others to partake in similar arrangements and this

A would adversely affect the successful enforcement of judgments granted by the courts. In the long term, the effectiveness and confidence in the bankruptcy law and the judicial process would be impacted. It would be inconsistent to the integrity of the bankruptcy regime if the plaintiff's claim was allowed. (paras 74, 75 & 78)

B **(5)** The denial of the plaintiff's claim would indeed bestow upon the defendant a windfall. However unattractive or unpalatable this may be, the opposite result of allowing the plaintiff's claim would bring greater harm. If the plaintiff's claim was allowed, it would mean that the court would be seen as aiding the plaintiff to achieve the very purpose for C which the provisions stipulated in s. 109 of the Bankruptcy Act (now Insolvency Act) and in s. 422 of the Penal Code aim to prohibit. This could only lead to the law being brought to disrepute and respect for the law diminished in our society. (para 81)

D **(6)** One may argue that by denying the plaintiff's claim, the gain to the defendant who gets to keep the shares in Semenyih Jaya worth quite a few million ringgit was disproportional to the loss by AMMB who was deceived by the illegal transaction and perhaps an order could be made for the defendant to compensate AMMB before the defendant was permitted to keep the shares. Quite apart from the fact that there was no E statutory provision permitting the court to make such an order, for the court to adopt such an approach would require the court to make value and/or moral judgment which would be wholly unsatisfactory and uncertain. In the premises, the defendant had successfully made out a plain and obvious case for this court to strike out the plaintiff's action F in this suit. (paras 87-89)

Obiter:

(1) The public confidence in our judicial system depends in no small measures by its effectiveness in the enforcement of the judgments ordered by the courts. Each judgment debtor is expected to respect the G judgment made against him by the court and to voluntarily pay the judgment creditor the judgment sum so ordered unless stayed by the court. Where enforcement proceedings have to be taken to recover the judgment sum, the assets of the judgment debtor ought to be made known and available to the judgment creditor through appropriate judicial H process if necessary so that the judgment creditor may look to the same to satisfy the fruits of its litigation. This entire recovery process would be rendered ineffectual and impotent if the judgment debtor is permitted to avoid his properties and assets from the reach of the judgment creditor. (para 77)

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Case(s) referred to:

Ecila Henderson v. Dorsett Healthcare University NHS Foundation Trust [2020] UKSC 43 ***(refd)***
Law Ding Hock v. Ng Yoon Lin [2008] 8 CLJ 94 HC ***(refd)***
Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Munday v. Hilbum [2014] EWHC 4496 ***(refd)***
Nelson v. Nelson [1995] 184 CLR 538 ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***
Pang Mun Chung & Anor v. Cheong Huey Charn [2018] 8 CLJ 663 CA ***(refd)***
Patel v. Mirza [2017] AC 467 ***(refd)***
Rolls & Stone Ltd (In Liq) v. Stephen Moores (a firm) [2009] UKHL 39 ***(refd)***
Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC ***(refd)***
Suntoso Jacob v. Kong Miao Ming & Anor [1986] 2 MLJ 170 ***(refd)***
Tinker v. Tinker [1970] 2 WLR 331 ***(refd)***
Tinsley v. Milligan [1994] 1 AC 340 ***(refd)***
Tribe v. Tribe [1996] Ch 107 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 109(1)
Contracts Act 1950, s. 24
Penal Code, s. 422
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

Contracts Act 1970 [NZ], ss. 6, 7

For the plaintiff - Alex Tan Chie Sian & Ho Zhi Yee; M/s Wong Kian Kheong
For the defendant - Derick Chan & Ivanpal Singh Grewal; M/s AJ Ariffin Yeo & Harpal

Reported by Suhainah Wahiduddin

JUDGMENT

Ong Chee Kwan JC:

Introduction

[1] This judgment deals with the enforcement of an illegal contract to place certain shares belonging to the plaintiff from the reach of his creditors. After settling with his creditors and obtaining an annulment of his bankruptcy order, the plaintiff sought from the defendant the return of the shares. The defendant claimed that the shares were transferred to him under an illegal contract and by reason thereof the court should not lend its hand in aid of the plaintiff's claims. The defendant filed an application to strike out the action.

[2] In resisting the striking out application, the plaintiff contended that he need not rely on the illegal contract in support of his claim. The plaintiff claimed that the defendant is holding the shares under a resulting trust. The plaintiff further relied on the principle of *locus poenitentiae* and the ruling in *Patel v. Mirza* [2017] AC 467 as alternatives to his resulting trust claim.

A **Background Facts**

[3] The plaintiff is the defendant's uncle. The defendant's late father, Low Kok Tuan ('LKT') is the plaintiff's brother. LKT passed away on 17 April 2016.

B **[4]** On 20 July 1983, at the plaintiff's request, LKT entered into a sale and purchase agreement for the purchase of a piece of land held under C.T. No. 14408, Lot Nos. 1883 and 1884 in the Mukim of Semenyih, District of Ulu Langat ('the Semenyih land').

[5] There is no dispute that the purchase consideration of the Semenyih C land was paid by the plaintiff.

[6] On 20 September 1983, the plaintiff founded Semenyih Jaya Sdn Bhd ('Semenyih Jaya'). The original shareholders and directors of Semenyih Jaya were the plaintiff and LKT. Again, there is no dispute that the shares were all paid for by the plaintiff.

D **[7]** On 30 November 1984, the plaintiff caused Semenyih Jaya to be registered as the owner of the Semenyih land. The Semenyih land constituted the only asset of Semenyih Jaya.

[8] In 1989, the plaintiff and LKT were sued in their capacity as E guarantors for a term loan granted by Arab-Malaysian Merchant Bank Berhad ('AMMB') to Sin Chuan Aik Sdn Bhd and as partners of Kiat Hoe Huat & Co for a loan facility granted by AMMB to them ('the AMMB legal proceedings').

[9] To avoid the consequences arising from the AMMB legal proceedings, F a trust deed was executed by the plaintiff on 16 May 1990 to declare that he held his one share in Semenyih Jaya in trust for the defendant on account of natural love and affection ('the trust deed').

[10] It is the plaintiff's case that he did not intend to give his one share in Semenyih Jaya to the defendant and that he would remain the beneficial G owner of the one share notwithstanding the trust deed. Put it simply, the trust deed was a sham which was intended to deceive the plaintiff's creditors, particularly, AMMB.

[11] In 1994, AMMB commenced bankruptcy proceedings against the H plaintiff and LKT based on judgments that AMMB had obtained against them in the AMMB legal proceedings.

[12] To avoid the consequences of bankruptcy, on 15 July 1995, the plaintiff transferred his one share in Semenyih Jaya to the defendant. Similarly, on 12 April 1996, LKT also transferred his one share in Semenyih I Jaya to the plaintiff's son, Lau Tein Khang ('LTK').

[13] Again, it is the plaintiff's case that he did not intend to give his one share in Semenyih Jaya to the defendant by the transfer and that the plaintiff remains the beneficial owner of the one share at all times. In support, the plaintiff stated that the defendant did not pay the plaintiff for the one share that was transferred to him and further that the defendant had agreed to re-transfer the plaintiff's one share and any other shares accrued from the said one share to the plaintiff when so requested. In this regard, the defendant had executed a blank Form of Transfer of Securities in Form 32A of the Companies Act 1965 ('blank transfer form') simultaneously with the plaintiff's transfer of his one share to the defendant.

[14] On 25 July 1995, the defendant was appointed a director of Semenyih Jaya and the plaintiff resigned as a director of Semenyih Jaya on 26 July 1995.

[15] The plaintiff was adjudicated a bankrupt on 2 August 1995.

[16] On 25 April 1996, upon the instruction of the plaintiff, LKT and the defendant appointed LTK as a director of Semenyih Jaya and on the same day, LKT resigned as a director of the company.

[17] LKT was adjudicated a bankrupt on 8 May 1996.

[18] Subsequently, on 25 May 1996, both the defendant and LTK were allotted with an additional 10,000 and 11,000 shares in Semenyih Jaya respectively. Further, on 8 November 1996, the authorised share capital of Semenyih Jaya was increased from 250,000 shares to 500,000 shares.

[19] Following from the increase in the authorised capital, 250,903 shares were allotted to LTK and 228,095 shares were allotted to the defendant respectively as bonus shares.

[20] It is the plaintiff's case that the 10,000 allotted shares and the 228,095 bonus shares allotted to the defendant are and were held by the defendant in trust for the plaintiff. This is based on the fact that these shares had arisen or accrued under the original one share that the plaintiff had transferred to the defendant.

[21] The plaintiff contended that he did not intend to give the 238,095 shares in Semenyih Jaya to the defendant at any time and no consideration was provided by the defendant in respect of these shares.

[22] On 23 November 2000, at the request of, *inter alia*, the plaintiff, a Compromise and Settlement Agreement was reached between AMMB on the one part and the defendant together with one Low Toon Tyne on the other part in respect of the outstanding due and owing under the judgments obtained from the AMMB legal proceedings. More specifically, AMMB had agreed to accept the sum of RM6,000,000 in full and final settlement of the

total outstanding sum of RM14,858,170.40. In return, AMMB had agreed to support the plaintiff and LKT's application to annul the bankruptcy order made against him ('the Compromise and Settlement Agreement')

[23] In 2002, the bankruptcy orders against the plaintiff and LKT were annulled.

[24] In 2006, the defendant left Semenyih Jaya and did not take part in the management and affairs of Semenyih Jaya thereafter.

[25] On 23 June 2011, the defendant presented a winding-up petition in the High Court *vide* Petition No. 28NCC-498-2011 against Semenyih Jaya and LTK ('the winding up petition') citing irretrievable breakdown in mutual understanding and underlying trust and confidence between the defendant and LTK. On the aforesaid ground, the defendant contended that it is just and equitable that Semenyih Jaya be wound up.

[26] However, on 23 August 2011, the defendant withdrew the winding up petition. The plaintiff contended that the withdrawal was prompted by LKT who recognised that all the shares in Semenyih Jaya registered in the defendant's name were held in trust for the plaintiff.

[27] On 22 May 2012, the plaintiff and LKT were appointed back as directors of Semenyih Jaya. On the same day, the authorised share capital of Semenyih Jaya was increased to 600,000 shares from 500,000 shares. The plaintiff and LKT were allotted one share each in Semenyih Jaya.

[28] On 28 November 2013, a meeting was held between the plaintiff, LKT, Low Toon Thye and Low Twan Kin. The plaintiff contended that at this meeting, it was agreed that in consideration of a total sum of RM1,200,000, LKT and the defendant shall not make any claim and shall not have any interest in Semenyih Jaya and or its assets ('the settlement'). However, the RM1,200,000 was not paid.

[29] On 4 November 2014, the defendant by his solicitors demanded that the plaintiff and LTK render an account for certain payments that were made between July and September 2013 from the bank account of Semenyih Jaya.

[30] This prompted the plaintiff to respond by asserting that the shares registered in the name of LKT and the defendant are held in trust for the plaintiff.

[31] The defendant has denied that the shares in Semenyih Jaya are held by LKT and him in trust for the plaintiff. This led to the filing of the present action where the plaintiff is seeking:

(i) A declaration that all 238,096 fully paid ordinary shares of RM1 each in the capital of Semenyih Jaya now standing in the name of the defendant are held in trust for the plaintiff absolutely;

(ii) An order that the defendant do transfer all the said 238,096 shares to the plaintiff within 14 days from the date of such order;

(iii) An order that in the event the defendant fails, refuses or neglects to transfer all the said 238,096 shares to the plaintiff within such period as ordered, the court is empowered to execute and or complete any requisite documents and or to do any act necessary on behalf of the defendant to give full effect to the transfer of shares; and

(iv) Costs on an indemnity basis.

Striking Out Application – Enclosure 9

[32] The defendant has filed an application under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 and or under the inherent jurisdiction of the court under encl. 9 to strike out the plaintiff's action. The main ground for the application is premised on illegality, namely, that the transfer of the plaintiff's one share and the subsequent allotment of the shares in Semenyih Jaya in the defendant's name in 1995 and 1996 respectively were to deceive the plaintiff's creditors and the Director General of Insolvency by putting the shares beyond their reach.

[33] By the plaintiff's own pleadings, it is conceded that the purpose for the transfer of the one share was to avoid the risks from the consequences of the AMMB legal proceedings which the plaintiff was facing at the material times.

[34] Therefore under s. 24 of the Contracts Act 1950, the agreement entered into between the plaintiff and the defendant is unlawful as it has the object of circumventing the provisions of the Bankruptcy Act (now Insolvency Act) and the Penal Code. It is also against public policy.

Court's Deliberation

[35] The defendant relied on the case of *Law Ding Hock v. Ng Yoon Lin* [2008] 8 CLJ 94 where the plaintiff, being an undischarged bankrupt, had arranged for monies which he had inherited from his deceased grandfather to be credited into the defendant's account whom he had shared a romantic relationship. The monies were then applied towards the purchase of three properties which were registered in the defendant's name. After the relationship turned sour, the plaintiff commenced proceedings seeking various declarations and orders that the defendant held the properties in trust for him.

[36] Relying on the High Court case of *Law Ding Hock* (*supra*) and the English case of *Tinker v. Tinker* [1970] 2 WLR 331, Tengku Maimum J (now Chief Justice) dismissed the plaintiff's claim holding that:

> ... the court will not aid the plaintiff who clearly had wanted to deceive the Director General of Insolvency in not putting the money into his own account.

[37] The applicable legal principle is that postulated in *Suntoso Jacob v. Kong Miao Ming & Anor* [1986] 2 MLJ 170 which held that 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality, and is unenforceable'.

[38] In *Tinker v. Tiker* (*supra*), Lord Denning MR explained at p. 333 the effect of action taken to avoid creditors in the following manner:

> So it is plain that the husband had the house put in his wife's name so as to avoid any risk of it being taken by is creditors in case his business was not a success. What is the result in law? In *Gascoigne v. Gascoigne* [1918] 1 KB 223, it was held that when a husband put a house in his wife's name so as to avoid it being taken by his creditors the house belonged to the wife. The husband could not be heard to say that it belonged to him, because he could not be allowed to take advantage of his own dishonesty.
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> ... He cannot say that the house is his own and, at the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely: or it was conveyed to her as trustee for her husband. It must be one or the other. The presumption is that it was conveyed to her for her own use; and he does not rebut that presumption by saying he only did it to defeat his creditors. I think it belongs to her.

[39] Having entered into an illegal contract, the party who is in *pari delicto* cannot come to court to enforce the contract. This legal principle, known as *ex turpi causa non oritur actio or ex turpi causa* in short is best explained by Lord Mansfield in *Holman v. Johnson* 98 ER 1120 at 1121 in this manner:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

[40] The application of the *ex turpi causa* defence when applied can result in the defendant being unjustly enriched at the expense of the plaintiff. It is a defence that rests on the foundation of public policy and not justice. It has two broad discernible policy reasons, namely, that a person should not be allowed to profit from his own wrong and that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand (See: Lord Toulson in *Patel v. Mirza* [2017] AC 467 at 499 para [99]).

[41] There is a plethora of cases in Malaysia adopting the approach in *Holman v. Johnson*, notably the Privy Council case of *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] 1 MLJ 143 and the Federal Court decision in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619.

[42] The *ex turpi causa* defence can be subdivided into two principles in relation to contractual obligations, namely:

(i) the court will not enforce a contract which is expressly or impliedly forbidden by statute or that is entered into with the intention of committing an illegal act; and

(ii) the court will not assist a claimant to recover a benefit from his own wrongdoing.

(See: UK's House of Lord's decision of *Rolls & Stone Ltd (In Liq) v. Stephen Moores (a firm)* [2009] UKHL 39 per Lord Phillips of Worth Matravers).

[43] Based on the aforesaid, learned counsel for the defendant submitted that the plaintiff's claim cannot be permitted as the object of the agreement with the defendant was aimed at putting the plaintiff's shares in Semenyih Jaya beyond the reach of his creditors as conceded in the plaintiff's statement of claim. This is clearly unlawful and the plaintiff's action is caught by the *ex turpi causa* principle and is bound to fail.

[44] In response, learned counsel for the plaintiff proffered three arguments in answer to the *ex turpi causa* principle.

[45] Firstly, it is contended by learned counsel for the plaintiff that the plaintiff need not rely on the illegality or the trust deed to make his claim against the defendant. The plaintiff's claim for the shares is based on a resulting trust which was created when the plaintiff transferred his one share in Semenyih Jaya to the defendant in 1995 without an intention that the beneficial ownership of the said share was to be transferred to the defendant. This is evidence by the fact that no consideration was given to the plaintiff from the defendant for the said transfer.

[46] Reference is made to the English case of *Tinsley v. Milligan* [1994] 1 AC 340. In that case, Miss Tinsley and Miss Milligan had jointly purchased a house which was registered in Miss Tinsley's name to facilitate a fraud by Miss Milligan to claim her housing benefits. When their relationship soured, Miss Milligan commenced an action to claim her interest in the house. Notwithstanding the illegality, the English House of Lords held that Miss Milligan could assert equitable ownership of the house. More specifically, Lord Browne-Wilkinson held at p. 371, para F-H and p. 376, para G as follows:

> ... The presumption of a resulting trust is, in my view, crucial in considering the authorities. On that presumption (and on the contrary presumption of advancement) hinges the answer to the crucial question 'does the plaintiff claiming under the resulting trust have to rely on the underlying illegality?' Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advance does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction ...; and
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> ... In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff found himself on a legal or equitable title: he is entitled to recover of he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.
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> As applied in the present case, that principle would operate as follows. *Miss Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and Miss Tinsley that they owned the house equally. She had no need to allege or prove why the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in Miss Tinsley alone. The illegality only emerged at all because Miss Tinsley sought to raise it. Having proved these facts, Miss Milligan had raised a presumption of resulting trust. There is no evidence to rebut that presumption. Therefore Miss Milligan should succeed.* (emphasis added)

[47] Learned counsel for the plaintiff submitted that there is no presumption of advancement operating in the defendant's favour when the plaintiff transferred his one share in Semenyih Jaya to the defendant as the relationship between the plaintiff and the defendant is one of uncle and nephew. This being the case, the plaintiff can rely on the presumption of resulting trust to claim the shares without relying on any illegal transaction, in particular, the creation of a trust to avoid creditors.

[48] With respect, I am unable to agree. Unlike the facts in *Tinsley v. Milligan* (*supra*), there is evidence to rebut the presumption of resulting trust in the present case. The trust deed suggests that the plaintiff was merely holding the one share in trust for the defendant at all times. Therefore the transfer of the one share in 1995 from the plaintiff to the defendant, unless there is other evidence showing otherwise, was nothing more than a transfer by the plaintiff as trustee of the share to the defendant as the beneficiary to the trust deed.

[49] Accordingly, the circumstances of the present case do not at all support a resulting trust as contended by the plaintiff. In any case, the reliance principle enunciated from the case of *Tinsley v. Milligan* (*supra*) which is essentially a procedural question has been rejected by the majority Law Lords in *Patel v. Mirza* (*supra*), a case which I will deal with in greater details below.

[50] Learned counsel for the plaintiff next contended that even if there is no resulting trust and the arrangement between the plaintiff and the defendant was an illegal transaction or for an unlawful purpose, nevertheless, the plaintiff is entitled to rely on the doctrine of *locus poenitentiae* which is an exception to the defence of illegality to recover the shares from the defendant.

[51] '*Locus poenitentiae*' which means 'the right to withdraw' or 'the time of repentance' refers to the act of repentance by a party who had entered into an unlawful contract. If the party in fact withdrew from carrying through with the illegal contract which remains executory, the doctrine will permit the party to recover money paid or goods transferred notwithstanding the illegality.

[52] The policy behind this rule appears to be that it discourages illegality by allowing parties to abandon illegal contracts. Thus, the claimant is allowed to withdraw from an illegal contract during 'the time for repentance' and recover benefits conferred even though the defendant is ready, willing and able to perform his or her side of the bargain. The precise boundaries of this doctrine are very unclear.

[53] In *Tribe v. Tribe* [1996] Ch 107, the English Court of Appeal held that where the presumption of advancement applies in a resulting trust, a plaintiff can rely on the illegality to rebut the presumption if the illegal purposes have not been carried into effect. In that case, Mr Tribe had worked all his life to establish and develop a prosperous business. Upon retirement, he planned to leave the business to his four children in equal parts. Unfortunately, two of his shops ran into some trouble with his landlord and he feared that they would go after his business. Hence, he transferred all his shares in the company to one of his sons on the agreed understanding that when the threat

was lifted the son would reassign the shares to his father. Eventually, Mr Tribe came into a satisfactory arrangement with the landlord, thus eliminating his fears. He therefore asked the son to return the shares to him who refused to do so. Since the rebellious assignee was his son, a legal presumption arose according to which property transferred from a father to son is meant as a gift. In order to rebut this presumption, Tribe had to rely directly on the illegal nature of the transaction when giving evidence, and explain that he did not mean to make a gift but rather to cheat his creditors. Evidence of this kind was legally inadmissible, but the court helped the father to get his shares back by declaring that the son held the shares on a resulting trust for his father. The trial judge found that the transfer of the share to his son was made for an illegal purpose, namely to deceive Mr Tribe's creditors, but since the purpose had not been carried out into effect and no creditor is deceived by the transaction, the doctrine of *locus poenitentiae* applied and Mr Tribe was able to recover the shares.

[54] The Court of Appeal unanimously upheld the trial judge's decision. Millet LJ stated at p. 124, para E-F and p. 133, para F-G as follow:

> It is, however, also settled both at law and in equity that a person who has transferred property for an illegal purpose can nevertheless recover his property provided that he withdraws from the transaction before the illegal purpose has been wholly or partly performed. This is the doctrine of the *locus poenitentiae* and it applies in equity as well as at law ...
>
> ... The primary rule which precludes the court from lending its assistance to a man who founds his cause of action on an illegal or immoral act often leads to a denial of justice ... The doctrine of the *locus poenitentiae* is an exception which operates to mitigate the harshness of the primary rule. It enables the court to do justice between the parties even though, in order to do so, it must allow a plaintiff to give evidence of his own dishonest intent. **But he must have withdrawn from the transaction while his dishonesty still lay in intention only. The law draws a line once the intention has been wholly or partly carried into effect.**
>
> (emphasis added)

[55] Based on the aforesaid, learned counsel for the plaintiff referred this court to the fact that the plaintiff had sometime in 2000 resolved with AMMB the sums owed under the AMMB legal proceedings which had led to the annulment of the bankruptcy order against the plaintiff in 2002. As the matter with the plaintiff's creditors had been resolved, learned counsel for the plaintiff contended that no creditor was deceived and that the illegal purpose was never carried into effect.

[56] According to learned counsel for the plaintiff, it is settled law that once bankruptcy is annulled, the effect of that annulment is that it 'wipe[s] out the bankruptcy altogether, and put the bankrupt in the same position as

if there had been no adjudication', reliance on the case of *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661; [2010] 4 MLJ 285 at 298, para 37. A

[57] With the bankruptcy wiped out and the creditors being paid and settled, no creditors had been deceived by the plaintiff's transferring his shares to the defendant. Hence, the plaintiff can rely on the doctrine of *locus poenitentiae* to recover the shares from the defendant notwithstanding the illegality in the arrangement. B

[58] Again, with respect to the learned counsel for the plaintiff, I am unable to agree. Unlike the facts in *Tribe v. Tribe* (*supra*), the plaintiff had in this case carried out the illegal purpose and in fact to permit the plaintiff to recover his shares would mean that the court will lend its hand to the plaintiff to achieve that very purpose. C

[59] The plaintiff had transferred his one share in Semenyih Jaya and permitted further shares to be registered in the defendant's name for the unlawful purpose of avoiding the same from being discovered by AMMB and or to put the share beyond the reach of AMMB in the enforcement of the judgments obtained against the plaintiff under the AMMB legal proceedings. D

[60] Indeed, after judgments were obtained against the plaintiff, AMMB was not able to recover the fruits of its litigation and the plaintiff was adjudged a bankrupt. There is no evidence that the plaintiff had declared to the Director General of Insolvency his shares in Semenyih Jaya if indeed the plaintiff had repented from his illegal action. E

[61] On the contrary, the plaintiff had proceeded to negotiate for a compromise and settlement with AMMB on the basis that a sum of RM6,000,000 be paid in full and final settlement of the total outstanding sum of RM14,858,170.40 under the Compromise and Settlement Agreement. There is nothing adduced before this court that the plaintiff had disclosed his ownership of his shares in Semenyih Jaya to AMMB when AMMB agreed to accept such a significant discount from the outstanding sum in settlement. F G

[62] Learned counsel for the plaintiff drew the court's attention to the fact that the Compromise and Settlement Agreement was entered into by the defendant and one Low Toon Tyne and not by the plaintiff, contending that the plaintiff was therefore not involved in deceiving AMMB into settling for the much reduced sum. However, there can be no denying that the Compromise and Settlement Agreement was executed by the defendant and Low Toon Tyne at the request of the plaintiff. It is disingenuous to contend that the plaintiff was innocent of any deception. H

I

[63] The fact that the plaintiff's bankruptcy had been annulled and the plaintiff is for all intent and purpose never a bankrupt does not in any way mean that no creditors had been deceived as contended by learned counsel for the plaintiff. The annulment was procured in reliance on the Compromise and Settlement Agreement which was in turn reached without the disclosure of the plaintiff's ownership of the Semenyih Jaya shares to AMMB.

[64] In any case, learned counsel for the defendant also drew this court's attention to the case of *Munday v. Hilbum* [2014] EWHC 4496 where the English High Court held that an undischarged bankrupt's criminal liability committed in his capacity as a bankrupt is not affected by the bankrupt's subsequent annulment of the bankruptcy order. Hence, the plaintiff's annulment of his bankruptcy order in this case does not take away the offences that the plaintiff had committed under the provisions of the Bankruptcy Act 1967 in this case.

[65] In the premises, I hold that the plaintiff is not able to rely on *locus poenitentiae* to make his claims for the shares from the defendant in this case. Not only is there no evidence that the plaintiff had repented from his unlawful act, the contrary is in fact the case – the plaintiff had successfully deceived AMMB to accept a much lesser sum as full and final settlement of the judgment debts and to support the annulment of his bankruptcy order. The plaintiff is only seeking to 'withdraw' from the arrangement with the defendant after the defendant has sought to assert ownership of the shares in defiance of the understanding reached with the plaintiff.

[66] I would also echo Lord Neuberger's objection to the 'repentance' requirement in relation to *locus poenitentiae* which he expressed in para. [156] of his judgment in *Patel v. Mirza* (*supra*) in the following passage:

> 156. For some time, it was assumed that the Rule could be invoked merely when the anticipated illegal purpose had not been proceeded with at all, but with the super-added requirement that that was so because of the "repentance" of the plaintiff who was seeking to get his money back. Like Millet LJ in *Tribe v. Tribe* [1996] Ch 107, 135, I would reject that notion. As he said, "[justice] is not a reward for merit", and in any event the notion that repentance is need "could lead to bizarre results". Further, a claimant's repentance may be born of, or combined with, self-interest, in which case, if repentance is the essential factor, the court would face a real difficulty. In my opinion, the notion that the application of a rule should depend on whether or not the claimant has repented typifies the inappropriately moralistic approach of some courts when they have to deal with claims based in some way on illegality, which was rightly criticised by Bingham LJ in *Saunders v. Edwards* [1987] 1 WLR 1116, 1134. Rather the court should adopt a more objective and analytical approach like that of McLachlin J in *Hall v. Herbert* [1993] 2 SCR 159.

[67] Finally, learned counsel for the plaintiff relied on *Patel v. Mirza* (*supra*) where the majority Law Lords led by Lord Toulson in the UK Supreme Court held that the rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct in order to establish the claim is no longer an immutable one. Instead, the court should assess whether the public interest would be harmed by the enforcement of the illegal agreement and this requires the court to consider (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim, (b) any other relevant public policy on which the denial of the claim may have an impact and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts ('the trio of considerations').

[68] In this regard, learned counsel for the defendant helpfully drew my attention to the recent UK Supreme Court case of *Ecila Henderson v. Dorsett Healthcare University NHS Foundation Trust* [2020] UKSC 43 where Lord Hamblen explained the 'trio of considerations' in *Patel v. Mirza* (*supra*) in this manner:

> 116. Secondly, questions arise as to exactly how under the trio of considerations approach relevant policy considerations are to be weighed. It appears that this must involve a balancing between considerations arising at the first and second stage; the third stage relates to proportionality and factors specific to the case rather than general policy considerations. Stage (a) is directed at policy reasons which support denial of the claim and stage (b) is directed at policy reasons which support denial of the illegality defence. As Lord Toulson makes clear at para 101, stage (b) is meant to operate 'conversely' to stage (a).

And at para. [123] of the judgment, His Lordship states:

> 123. Fourthly, questions arise as to whether proportionality always has to be considered and as to how it is to be addressed. In some cases, of which *Hounga v. Allen* is an example, it may be apparent that the balancing of policy considerations comes down to firmly against denial of the claim. If so, it will not be necessary to go on to the third stage and the issue of proportionality. This is consistent with Lord Toulson's statement at para 107 that these factors relate to "whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled" and at para 101 that they fall to be considered to avoid "the possibility of overkill". In other words, they are a disproportionality check rather than a proportionality requirement.

[69] The effect of the decision in *Patel v. Mirza* (*supra*) is that the reliance based approach in *Tinsel v. Milligan* should not be followed. Instead a policy based approach based on an assessment of relevant competing public policy considerations and proportionality factors should be adopted instead. The

A minority Law Lords however do not share the view of the majority and considered the reliance based approach should continue to be applied. Lord Mance expressed his view at para [199] as follows:

> 199. ..., reliance on illegality remains significant as a bar to relief but only in so far as it is reliance in order to profit from or otherwise enforce an
B illegal contract. Reliance in order to restore the *status quo* is unobjectionable.

[70] The minority Law Lords were of the view that the policy approach to illegality as propounded by the majority Law Lords is:

> C ... far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights ... It converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of "complexity, uncertainty, arbitrariness and lack of transparency" which Lord Toulson JSC attributes to the present law.
>
> [per Lord Clarke of Stone-cum-Ebony JSC at para 217]

D

[71] *Patel v. Mirza* (*supra*) has been applied by our Court of Appeal in *Pang Mun Chung & Anor v. Cheong Huey Charn* [2018] 8 CLJ 663; [2018] 4 MLJ 594 and our Federal Court in *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2018] 1 LNS 1613.

E **[72]** Thus, learned counsel for the plaintiff contended that the consequence of ruling that the plaintiff's claim against the defendant is unenforceable on the ground of illegality will result in the defendant being unjustly enriched when the defendant is also a party in *pari delicto*. It will also mean that this court will be encouraging a party who has been entrusted with another's
F property to renege on his words or promise to return or re-transfer the property to unjustly enrich himself at the expense of the true owner. If there is any punishment for the illegal conduct, it is for the criminal courts to mete out.

[73] Before I deal with the plaintiff's aforesaid submission, it must be
G highlighted that in *Patel v. Mirza* (*supra*), the UK Supreme Court was dealing with a case where the illegality enterprise was not carried out because the insider information had become unavailable which frustrated the arrangement. The court was not asked to give effect to the illegality but rather to unwind it. It was in respect of these particular facts before the UK
H Supreme Court that the Law Lords had to consider whether a strict application of the reliance test would be the proper approach. Applying the trio of considerations to the facts of that case, the UK Supreme Court came to the conclusion that the illegality should not operate to deny Mr Patel his right to recover his money.

I

[74] The facts in our present case are vastly different. The plaintiff's action in transferring his shares to the defendant and not disclosing the same to avoid his creditors and to deceive the Director General of Insolvency is a contravention of s. 109(1) of the Bankruptcy Act 1967 (now Insolvency Act 1967) which states:

> 109(1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:
>
> (a) If he does not to the best of his knowledge and belief fully and truly discover to the Director General of Insolvency all his property, and how, and to whim, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of trade, if any, or laid out in the ordinary expenses of his family, unless he proves that he had no intent to defraud;
>
> (b) If he does not deliver up to the Director General of Insolvency or as he directs all such part of his property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud;
>
> (c) ...
>
> (d) If after the presentation of a bankruptcy petition by or against him or within 12 months next before such presentation he conceals any part of his property to the value of RM100 or upwards or conceals any debt due to or from him, unless he satisfies the court that he had no intent to defraud;
>
> (e) ...
>
> (f) If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

[75] The plaintiff's action is also a contravention of s. 422 of the Penal Code Act 574 which stipulates:

> **Dishonesty or fraudulently preventing from being made available for his creditors a debt or demand due to the offender**
>
> 422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

[76] The underlying object of the aforesaid statutory provisions is to prevent any dishonesty and or fraudulent action by the debtor to deceive his creditors and to ensure that all the available assets of the debtor are made known to the Director General of Insolvency for the benefit of the debtor's creditors.

[77] The public confidence in our judicial system depends in no small measures by its effectiveness in the enforcement of the judgments ordered by the courts. Each judgment debtor is expected to respect the judgment made against him by the court and to voluntarily pay the judgment creditor the judgment sum so ordered unless stayed by the court. Where enforcement proceedings have to be taken to recover the judgment sum, the assets of the judgment debtor ought to be made known and available to the judgment creditor through appropriate judicial process if necessary so that the judgment creditor may look to the same to satisfy the fruits of its litigation. This entire recovery process would be rendered ineffectual and impotent if the judgment debtor is permitted to avoid his properties and assets from the reach of the judgment creditor.

[78] To my mind, it is obvious that the said purpose of the aforesaid provisions in the Bankruptcy Act and the Penal Code will be enhanced if the plaintiff's claim in this case against the defendant is denied. The illegality in the arrangement between the plaintiff and the defendant is the very act that is prohibited by the statutory provisions. To permit the claim will only encourage others to partake in similar arrangements and this will adversely affect the successful enforcement of judgments granted by the courts. In the long term, the effectiveness and confidence in the bankruptcy law and the judicial process will be impacted. It will be inconsistent to the integrity of the bankruptcy regime if the plaintiff's claim is allowed. Accordingly, the first consideration in *Patel v. Mirza* must be answered in the affirmative.

[79] I will now consider the second of the trio of consideration – whether there is any public policy consideration of which the denial of the plaintiff's claim will have an impact, in other words, whether there are any public policy reasons that would favour denying the plaintiff's claim or otherwise weigh in favour of allowing the claim. As explained by Lord Hamblen, whether there are public policy reasons supporting the denial of the illegality defence.

[80] Learned counsel for the plaintiff submitted that the denial of the plaintiff's claim will result in the defendant being unjustly enriched from a breach of his undertaking or promise to return the shares to the plaintiff. The defendant's refusal to return the shares in reliance on the illegality for which he was a willing participant comes across as reprehensible or iniquitous. After all, there should be honor even among thieves.

[81] It is certainly true that the denial of the plaintiff's claim will indeed bestow upon the defendant a windfall. However, however unattractive or unpalatable this may be, the opposite result of allowing the plaintiff's claim will bring greater harm. If the plaintiff's claim is allowed, it will mean that the court will be seen as aiding the plaintiff to achieve the very purpose for which the provisions stipulated in s. 109(1) of the Bankruptcy Act (now

Insolvency Act) and in s. 422 of the Penal Code aim to prohibit. This can only lead to the law being brought to disrepute and respect for the law diminished in our society. Whilst it is true that the punishment for the offence is a matter left for the criminal court, it will be inconsistent for this court to permit the plaintiff to recover the fruit of his illegal act in this action when the same action is deemed appropriate to be punished in the criminal court. In fact, the denial of the plaintiff's claim in this case is no different from the court's approach when dealing with claims by lenders engaged in illegal moneylending transactions.

[82] Accordingly, it is also my view that the second of the trio considerations is to be determined against the plaintiff in this case.

[83] As regards the third consideration pertaining to proportionality, based on the decision by Lord Hamblen in *Ecila Henderson v. Dorsett Healthcare University NHS Foundation Trust* (*supra*), it will not be strictly necessary to consider this given that I have held that the balancing of policy considerations in the first two stages are decided against the plaintiff's claim.

[84] However, one may argue that the proportionality consideration is not confined to a disproportionality check in respect only where the plaintiff's claim is allowed. In the case where the plaintiff's claim is denied and the defendant is left with a windfall, it may be a case where the defendant's gain is said to be disproportionate to court's decision to disallow the plaintiff's claim.

[85] The aforesaid has led to the majority of the Australian court in *Nelson v. Nelson* [1995] 184 CLR 538 to pioneer a novelty decision by requiring the account to the public for any profit unjustifiably made at the public expense as a condition of obtaining relief.

[86] On the other hand, New Zealand has introduced the New Zealand Illegal Contracts Act 1970 where s. 6 provides that "every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract ..." and in s. 7 confers on the court the power to grant relief "by way of restitution, compensation, variation of the contract, validation of the contract in whole or in part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just".

[87] In our instant case, one may argue that by denying the plaintiff's claim, the gain to the defendant who gets to keep the shares in Semenyih Jaya worth quite a few million ringgits is disproportional to the loss by AMMB who was deceived by the illegal transaction and perhaps an order can be made for the defendant to compensate AMMB before the defendant is permitted to keep the shares.

[88] There is a simple answer to the aforesaid contention. Quite apart from the fact that there is no statutory provision permitting the court to make such an order, for the court to adopt such an approach will require the court to make value and or moral judgment which would be wholly unsatisfactory and uncertain.

Conclusion

[89] In the premises, I find that the defendant has successfully made out a plain and obvious case for this court to strike out the plaintiff's action in this suit and I so order with costs fixed at RM10,000 subject to payment of allocator.